



Comptroller General
of the United States

Washington, D.C. 20548

146897

Decision

Matter of: Instrumentation Laboratory Company--Request for
Declaration of Entitlement to Costs

File: B-246819.2

Date: June 15, 1992

Thomas E. Evans, III, Esq., Thomas Evans and Associates, for
the protester,
Tania L. Calhoun and Christine S. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester is not entitled to award of the costs of filing
and pursuing its protest where, in response to the protest,
the agency terminated the awardee's contract and awarded the
contract to the protester 7 working days after the protest
was filed.

DECISION

Instrumentation Laboratory Company (ILC) requests that our
Office declare it entitled to recover the reasonable costs
of filing and pursuing its protest challenging the award of
a contract to Baxter Scientific Products under request for
proposals (RFP) No. F3465-91-R-0258, issued by the
Department of the Air Force, Tinker Air Force Base,
Oklahoma. The protest asserted that Baxter's proposal
failed to comply with the salient characteristics set forth
in the RFP.

The protest was filed on November 27, 1991. In response to
the protest, on December 6 the Air Force advised the
protester and our Office that it was taking corrective
action by terminating the awardee's contract for the
convenience of the government and awarding the contract to
the protester. Since the protester had been granted the
relief requested, we dismissed the protest as academic on
December 10. On December 20, ILC filed a claim with our
Office under our Bid Protest Regulations, 4 C.F.R. § 21.6(e)
(1992), for the costs of filing and pursuing the protest.

Where the contracting agency takes corrective action prior
to our issuing a decision on the merits of a protest, we may
declare the protester to be entitled to "recover the
reasonable costs of filing and pursuing the protest,

including attorneys' fees." Id., Metters Indus., Inc.--Request for Declaration of Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. As we have previously stated, see, e.g., Leslie Controls, Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ 50, it is not our intention to award protest costs in every case in which the agency takes corrective action in response to a protest. Our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, and we believed that providing for the award of costs in cases where the agency delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12,834, 12,836 (1990). Consequently, our intent is to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Iowa-Illinois Cleaning Co.--Request for Declaration of Entitlement to Costs, B-245545.2, Nov. 12, 1991, 91-2 CPD ¶ 451.

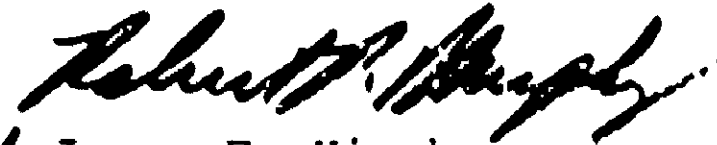
Here, there is no question the agency acted promptly. The Air Force contacted ILC 7 working days after ILC filed the protest, and provided the remedy the protester had requested. Such corrective action, taken early in the protest process, is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. See Everite Mach. Prods., Inc.--Request for Declaration of Entitlement to Costs, B-246582.2, Apr. 6, 1992, 92-1 CPD ¶ _____. It provides no basis for a determination that the payment of protest costs is warranted.

In its request for reimbursement of the costs of filing and pursuing its protest, ILC asserts that we currently apply a "time of corrective action standard" in deciding whether to award costs. ILC requests that we reevaluate this position and award costs instead to the prevailing party without regard to the timing of the agency's corrective action.

As an initial matter, ILC has incorrectly characterized our position. We do not rely on a strict "time standard" in our consideration of entitlement to costs. While we do consider the timing of the agency's decision to take corrective action and the communication of that decision to our Office and the protester, as we stated in the explanatory material accompanying the promulgation of the final regulation, we also take into account all the circumstances of each case, including the nature of the protester's allegations and the type of corrective action planned. 56 Fed. Reg. 3,762 (1991).

As to ILC's position that we should award costs to the prevailing party without regard to the timing of the agency's corrective action, we fully considered a wide range of opinions on this question in the course of promulgating our regulations. See 54 Fed. Reg. 14,361 (1989); 55 Fed. Reg. 12,834 (1990). We believe that, in many cases, there would be little incentive for agencies to provide timely corrective action if they were to incur the same costs in settling a protest as they would going through the entire process and losing on the merits of our final decision. Consequently, our regulations do not contemplate reimbursement except in cases of undue delay by agencies. Dynair Elecs., Inc.--Request for Declaration of Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260.

We deny ILC's request for a declaration of entitlement to its protest costs. See Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.


for James F. Hinchman
General Counsel